IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 36

CARL C. INMAN,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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No. 724

CARL C. INMAN,

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

In addition to the statutes referred to by petitioner (Petition, pp. 3-4), the following statutes of the State of Ohio are involved in this case and are set forth in an Appendix to this brief at pages 13-14:

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev. Code Sec. 4511.20);

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev. Code Sec. 4511.30);

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev. Code Sec. 4511.36);

Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39);
Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43).

QUESTIONS PRESENTED

1. By pleading a cause of action under the Federal Employers Liability Act, does the plaintiff acquire an absolute right to have issues submitted to a jury, unfettered by any judicial review of the evidence offered in support of his cause?

2. Does the plaintiff establish a prima facie case under the Federal Employers Liability Act by showing that while on duty as a grade crossing watchman he was struck and injured by a reckless and drunken hit-and-run driver?

STATEMENT OF THE CASE

The petitioner's statement of the case is more argumentative than factual. This is perhaps understandable, since the essential facts which are not in dispute do not favor his cause against the respondent. In view of the omissions and inaccuracies in the petitioner's statement, however, it becomes necessary to give some account of the facts which are supported by the evidence in the record.

The case involves injuries to a railroad crossing watchman who was struck by a reckless and drunken hit-and-run driver at a grade crossing in the City of Akron, Ohio on January 2, 1952. The physical characteristics of the crossing are important in the consideration of the case and warrant a rather detailed description.

At this crossing, known as "Bettes Corners," Tallmadge Avenue, a main thoroughfare running east and west, was intersected by Home Avenue, running in a slight northeast-southwest direction. Three railroad tracks of the re-

spondent extended through the intersection of these two streets in a slightly northwesterly and southeasterly direction. The most easterly track was a side or switch track, the middle was the eastbound main, and the most westerly was the westbound main track (Joint Ex. A; R. 236, 370).

All street approaches to the railroad crossing were protected by highway warning signals, commonly known as "flasher lights." Located to the east of the side track and south of Tallmadge Avenue was a watchman's shanty, where the railroad crossing watchman would stay when he was not flagging for approaching trains, and where his special equipment, consisting of lamps, stop signs, fusees, torpedoes, etc., was kept (R. 38, 39). There was also a listening phone in the shanty connected with the nearby XN Tower so that the watchman could hear the dispatcher issuing orders and giving the location of various trains (R. 46). A "tell-tale" flashing light inside the shanty gave the watchman notice of an approaching train (R. 5). Outside the shanty there was a similar flashing light to give notice of approaching trains, located on a 25-foot pole near the south curb of Tallmadge Avenue, east of the crossing (R. 179).

The electrical circuits controlling these signals were so arranged that the "tell-tale" flashing lights in and outside the shanty commenced operation when an eastbound train was 2,066 feet from the crossing, and when a westbound train was 3,455 feet from the crossing. The highway flashers were activated when a train from either direction was about 2,000 feet from the crossing. Both the flashers and the "tell-tale" lights continued to function until the respective trains had cleared the crossing by 75 to 105 feet (R. 178-180, 192-193). There was also a standard railroad block signal located to the south of the crossing on a mast 27 feet high, by which the watchman could determine when any

westbound train was within 3,455 feet of the crossing (R. 60-61, 182-183).

All of the signals described were inspected before and after the accident and were found to be in perfect working order (R. 184).

For Home Avenue traffic approaching from the south, there was one standard highway stop sign near the flasher lights before reaching the tracks and another after passing the tracks directly at the intersection of Tallmadge Avenue, a main thoroughfare (R. 56-57). There was a City street light on a pole about 25-30 feet west of the tracks on the south side of Tallmadge Avenue, which had a shield to direct the rays downward on to the street (R. 25, 52).

At the time of the accident on January 2, 1952, the petitioner had been employed by The Baltimore and Ohio Railroad Company as a crossing watchman for about seven years, and had been working the 11:00 P.M. to 7:00 A.M. shift at the "Bettes Corners" crossing for about three years (R. 1, 2). He was thoroughly familiar with the crossing, with his duties and with the Company rules governing the work in which he was engaged (R. 5-9, 38).

Shortly after midnight, the "tell-tale" lights at the watchman's shanty and the highway flashers began flashing, indicating the approach of an eastbound train. As was his duty and custom, the petitioner left the shanty and stationed himself in the center of Tallmadge Avenue, about 2 or 3 feet west of the westbound tracks. He was carrying a whistle and red and green lanterns. The night was cold but clear and the pavement was dry (R. 6-7, 47). When the train "got close enough" to the crossing, the petitioner blew his whistle and began swinging the red lantern which he held in his right hand to stop traffic, first on Tallmadge Avenue, then on Home Avenue, making sure that all vehi-

cles saw the signal (R. 47). The crossing was well lighted and he was standing in the rays of one of the City's lights located on the southwest corner of the crossing (R. 55, 340). The eastbound train, consisting of a steam engine, 80 empty gondola cars and a caboose, passed over the crossing (R. 163, 165). Just after the caboose cleared the crossing, an automobile driven by one James Ball, which had been waiting in line behind several other cars headed north on Home Avenue, pulled out of the line of traffic and with tires screeching drove up to the crossing at a high rate of speed in the wrong lane of traffic, made a sharp left turn into Tallmadge Avenue, struck and injured the petitioner and sped away from the scene (R. 71-77, 138, 153-156). There is uncontradicted evidence that the driver, Ball, was under the influence of alcohol at the time (R. 135). It is also undisputed that from the time that he pulled out of the line of traffic until he struck the petitioner, Ball violated the five Ohio traffic statutes set forth in the Appendix to this brief at pages 13-14. There is no question or contention in this case as to the manner in which the accident occurred.

The petitioner brought suit against The Baltimore and Ohio Railroad Company under the Federal Employers Liability Act in the Court of Common Pleas of Summit County, Ohio, and received a verdict and judgment in the amount of $25,000.00.

The Ohio Court of Appeals reversed and entered final judgment for the defendant, holding that the verdict and judgment of the trial court were not sustained by any probative evidence. The Court of Appeals also ruled that the trial court had committed prejudicial error in the rulings on the instructions and in the general charge to the jury, which would have required a new trial. (Petition, Appendix pp. 17-28).

In the Supreme Court of Ohio, after the filing of briefs and oral argument, the petitioner's motion to certify the record was denied; his appeal as of right was dismissed; and his application for rehearing was denied (Petition, Appendix pp. 31, 32).

ARGUMENT

1. The Petitioner Was Not Entitled To Have His Case Submitted To A Jury Because He Presented No Evidence of Railroad Negligence.

The petitioner seems to feel that by pleading a purported cause of action under the Federal Employers Liability Act he acquires an absolute and inalienable right to have issues submitted to a jury. He claims that he has been deprived of this "right" because the Court of Appeals has examined the record to see whether there is any evidence to support his cause. While his present quarrel is with the Court of Appeals and the Supreme Court of Ohio, he would undoubtedly have asserted a similar claim of deprivation had the trial court correctly performed its duty by directing a verdict for the defendant. In short, the petitioner seeks to preclude *any* judicial review of the sufficiency of the evidence.

Despite any contrary illusions which the petitioner may hold, there is no law which permits any plaintiff to recover damages upon mere allegations of negligence without proof to support them. The right of a plaintiff to have a jury decide his case arises only when *evidence* is produced to sustain his claim.

It is and has always been the function and the duty of the courts to determine whether there is sufficient evidence to be submitted to a jury. And it is well settled that in making this determination, the courts do not invade the

province of the jury, nor deprive a plaintiff of his constitutional right to a trial by jury. *Commissioners of Marion County v. Clark*, 94 U.S. 278, 284; *Baltimore and Ohio R. Co. v. Groeger*, 266 U.S. 521, 524; *Gunning v. Cooley*, 281 U.S. 90, 94; *Galloway v. U. S.*, 319 U.S. 372.

The standard to be applied in reviewing the sufficiency of the evidence in cases arising under the Federal Employers Liability Act has been enunciated in the recent decision in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, where the Court said, at pages 506, 507:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

Subsequent decisions have consistently followed and cited the pronouncement from the *Rogers* case. *Arnold v. Panhandle and Santa Fe R. Co.*, 353 U.S. 360; *McBride v. Toledo Terminal R. Co.*, 354 U.S. 517; *Gibson v. Thompson*, 355 U.S. 18. The statement gives recognition to certain fundamental principles which the petitioner has completely ignored. First there must be *proof* (as distinguished from theories or allegations) of negligence. Second, the proof must justify the reasonable conclusion that negligence of the employer played *some* part in the injury. Third, there must be some *judicial* appraisal of the proofs.

The Court of Appeals has scrupulously followed these principles in making an appraisal of the proofs offered in this case and has reached the only reasonable conclusion, i.e., *that there was no negligence on the part of the defendant* (Opinion of the Court of Appeals, Petition, Appendix p. 24).

2. The Petitioner Has Not Established a Prima Facie Case Under the Federal Employers Liability Act by Showing That While on Duty as a Grade Crossing Watchman He was Struck by a Reckless and Drunken Hit-and-Run Driver.

It should be emphasized that there is no dispute whatever in this case as to the manner in which the petitioner was injured. He was standing at a well-lighted crossing and the intersecting streets were all protected by operating flasher lights. The warning devices installed by the railroad had given him ample notice of the approach of the train and he had been furnished with lamps and a whistle to stop highway traffic. Automobiles had been stopped for some minutes awaiting the passage of the train and three of these motorists gave uncontradicted testimony that the watchman was in plain sight at the time (Bailey, R. 70; Feathers, R. 139; Martin, R. 154). Everything was under control as the caboose on the end of the train approached the crossing and there was no reason to anticipate danger from any source. Then suddenly, a drunken driver pulled his automobile out of the line of traffic, and came up to the crossing at a high rate of speed on the wrong side of the street, ignored stop signs, illegally turned, struck and injured the petitioner and raced away from the scene. The petitioner was the unfortunate victim of a drunken hit-and-run driver, but there is not a scintilla of evidence in the entire record of any negligence on the part of the railroad.

In searching the record, the petitioner has struck upon two isolated phrases in the testimony and labels them "evidence" to support his theories of negligence.

The first comes from the witness Bailey, a motorist waiting at the crossing who, in describing this occurrence, refers to "this car, like a lot of them I seen there, jumping the gun." To characterize the criminally reckless conduct of

the hit-and-run driver as "jumping the gun" is rather grotesque. But even more fantastic is the petitioner's conclusion, *based solely and explicitly upon this fragment of testimony*, that the respondent could or should have anticipated and prevented this criminal negligence which injured him. Though the petitioner had been working at the crossing for several years there is not the faintest suggestion in his testimony or from any other source that there had ever been any similar occurrence or any other kind of accident whatever.

The second fragment of testimony, lifted from context and cited in the petition, is from Raymond Peterson, a brakeman standing on the rear platform of the caboose as the train passed the crossing. In describing his own activities, Peterson said:

> "It is customary when passing a place where an employee may be stationed to observe that employee so as to see if he gives a signal that would affect your movements of your train, such as a hot box, and so forth" (R. 167-168).

In cross-examination, counsel for the petitioner asked the question cited at page 10 of the petition:

> "You say it was the watchman's duty to keep watching your train as it went by to see if there were any hot boxes or anything wrong with your train, and if there was he'd give you a signal? That is customary?"

To which Peterson replied:

> "That's customary, *other duties permitting* he is generally required to do that" (R. 172).

The import of this testimony is clear. Obviously if the watchman happened to see a hot box on a passing train he would tell somebody about it. *But the petitioner did not testify that he had any duty other than to warn highway*

traffic of passing trains. It is apparent that the petitioner was not paying any attention to the train on this occasion for he thought it contained about forty-five box cars, whereas there were actually 80 empty gondola cars (R. 44, 165). Furthermore, there is uncontroverted evidence that the petitioner was not facing the train when he was struck and injured. See the testimony of petitioner (R. 10, 229); Sam Bailey (R. 74-75); Charles Feathers (R. 143-144); John Martin (R. 153-154); and Raymond Peterson (R. 169). There is no evidence and no possible inference that the duties of the petitioner had any remote connection with his injury.

There are several cases involving similar factual situations in which directed verdicts for the defendant have been upheld. In *Woods v. New York Central R. Co.*, 222 F. 2d 551 (6th Cir., 1955), a plaintiff was employed by the defendant railroad as a crossing watchman at the intersection of defendant's double tracks and Main Street in Springfield, Ohio. At 3:00 A.M., upon receiving a signal that a train was approaching, plaintiff started the flasher lights and took his position in the middle of the street. While blowing his whistle and swinging his lantern to warn traffic of the approaching train, a motorist crashed into plaintiff and thereafter fled the scene. On the trial, the court directed a verdict in favor of defendant; and upon appeal, the Court of Appeals affirmed, holding that there was no evidence of negligence on defendant's part. See also *Murray v. Atlantic Coast Line R. Co.*, 218 N.C. 392, 11 S.E. 2d 326 (1940); *Boyd v. Seaboard R. Co.*, 200 N.C. 324, 156 S.E. 507 (1931).

The decisions in *Lillie v. Thompson*, 332 U.S. 459; *Cahill v. New York, New Haven and Hartford R. Co.*, 350 U.S. 898, 351 U.S. 183; and *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, do not support the petitioner's argument in

this case. Rather, they tend to emphasize that where the injury is caused by the wrongful act of a third person, there must be probative evidence upon which a jury can properly infer that the injury was foreseeable by the employer.

The decision of the Court of Appeals in this case is not based upon any technical arguments as to proximate cause, but rather on the complete absence of any evidence of negligence. As the court said in its opinion (Petition, Appendix p. 24):

> "There is no evidence in this record of failure on the part of defendant to furnish plaintiff with all of the safeguards in the performance of his work, which reasonably prudent operators of railroads furnish under like or similar circumstances. And there is further no evidence of prior occurrences of the kind here under consideration, which would put the defendant on notice of likelihood of injuries to one in the position of plaintiff.
>
> That the plaintiff, while in the discharge of his duties as crossing watchman, would be injured by the actions of a drunken driver, violating five traffic statutes and ordinances, was not, in our opinion, such an occurrence as, under the evidence of this record, was reasonably foreseeable by defendant.
>
> There was, accordingly, no duty imposed on defendant to anticipate such an occurrence as eventuated, and hence no negligence for failure to guard against it."

The Court of Appeals has not weighed the evidence; it has simply looked at the record, in accordance with the mandate of this Court in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, and found that the proofs do not justify the conclusion that the negligence of the employer played any part at all in the injury.

CONCLUSION

The decision is clearly correct and is not in conflict with any decision of this court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX

STATUTES OF THE STATE OF OHIO

Ohio Gen. Code Sec. 6307-20 (now Ohio Rev. Code Sec. 4511.20):

Reckless operation of vehicles.

No person shall operate a vehicle, trackless trolley or street car without due regard for the safety and rights of pedestrians and drivers and occupants of all other vehicles, trackless trolleys and street cars, and so as to endanger the life, limb or property of any person while in the lawful use of the streets or highways.

Ohio Gen. Code Sec. 6307-30 (now Ohio Rev. Code Sec. 4511.30):

Driving to left of center line forbidden, when.

(a) No vehicle or trackless trolley shall, in overtaking and passing traffic, or at any other time, be driven to the left of the center or center line of the roadway under the following conditions:

* * *

3. When approaching within one hundred feet of or traversing any intersection or railroad grade crossing, unless compliance with this section is impossible because of insufficient roadway space.

Ohio Gen. Code Sec. 6307-35 (now Ohio Rev. Code Sec. 4511.36):

Rules governing turns at intersections.

The driver of a vehicle intending to turn at an intersection shall do so as follows:

* * *

(b) At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that

portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

* * *

Ohio Gen. Code Sec. 6307-38 (now Ohio Rev. Code Sec. 4511.39):

Appropriate signal to be given when turning or changing speed; mechanical signal device.

(a) No person shall turn a vehicle or trackless trolley from a direct course upon a highway unless and until such person shall have exercised due care to ascertain that such movement can be made with reasonable safety to other users of the highway and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the event any traffic may be affected by such movement.

* * *

Ohio Gen. Code Sec. 6307-42 (now Ohio Rev. Code Sec. 4511.43):

Right-of-way at through highway, stop signs.

(a) The operator of a vehicle, intending to enter a through highway, shall yield the right of way to all other vehicles, street cars or trackless trolleys on said through highway.

(b) The operator of a vehicle, street car or trackless trolley shall stop in obedience to a stop sign at an intersection where a stop sign is erected and shall yield the right of way to all other vehicles, street cars or trackless trolleys not so obliged to stop.